Office-Supreme Court, U.S.
FILED
JUL 29 1961
JAMES R. BROWNING, Clerk

In The
Supreme Court of the United States

No. 269
October Term, 1961

MORRIS W. LIPP, trading as Midwest Poster Exchange,
Petitioner

BENJAMIN SIEGEL, trading as Theatre Advertising Company,
Petitioner

FANNIE SCHRADER, Administratrix of the Estate of Jay Schrader, trading as Charlotte Poster Exchange, Deceased,
Petitioner

DAVID MITCHEL, trading as Southwest Poster Service,
Petitioner

JACOB RIFF,
Petitioner

HARRY VOGELSTEIN, trading as Baltimore Poster Company,
Petitioner

v.

NATIONAL SCREEN SERVICE CORPORATION ET AL.,
Respondent

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as Independent Poster Exchange et al.,
Petitioners

v.

NATIONAL SCREEN SERVICE CORPORATION ET AL.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANCIS T. ANDERSON,
Attorney for Petitioners.

Girard Trust Company Bldg.,
Philadelphia 2, Penna.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

INDEX

	Page
Petition for Writ of Certiorari:	
Citation to Opinions Below	2
Jurisdiction	3
Questions Presented	3
Statement of the Case	4
Reasons for Granting the Writ	16
Argument:	
1.	17
2.	21
3.	22
Conclusion	24
Appendices:	
Appendix A—Opinion Filed May 2, 1961	25
Appendix B—Opinion Filed September 22, 1960	29
Appendix C—Excerpts From Pretrial Conferences	34
Appendix D—Petition for Rehearing	43
Appendix E—Judgments	45

TABLE OF CASES

Holker v. Parker, 7 Cranch 436 (1813) 16, 17, 20, 22

In Re Gsand, 153 F2d 1001 (Cir. 3, 1946) 18, 20

Lawlor v. National Screen Service Corp., 270 F2d 146, cert. den. 362 U.S. 922 8

Petition of Trinidad Corporation, 229 F2d 423, 429-30 (Cir. 2, 1955) 18

Ricketts v. Pennsylvania R. Co., 153 F2d 757 (Cir. 2, 1946) 18

United States v. Beebe, 180 U.S. 343 (1901) 16, 17, 21

United States v. DuPont Nemours & Co., U.S. , May 22, 1961 22

Case Caption

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1961

Morris W. Lipp, trading as Midwest Poster Exchange,
Petitioner

Benjamin Siegel, trading as Theatre Advertising Company,
Petitioner

Fannie Schrader, Administratrix of the Estate of Jay Schrader, trading as Charlotte Poster Exchange, Deceased,
Petitioner

David Mitchell, trading as Southwest Poster Service,
Petitioner

Jacob Riff,
Petitioner

Harry Vogelstein, trading as Baltimore Poster Company,
Petitioner

v.

National Screen Service Corporation, et al.

Charles Lawlor and Mitchell Pantzer, co-partners trading as Independent Poster Exchange, et al.,
Petitioners

v.

National Screen Service Corporation, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners severally pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above entitled cases on May 2, 1961.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals has not been reported, but is printed herein in Appendix A, *infra*, pp. 25-28.

The opinion of the United States District Court has not been reported, but it is printed herein in Appendix B, *infra*, pp. 29-33.

JURISDICTION

The judgments of the United States Court of Appeals were entered on May 2, 1961. A timely petition for a rehearing was filed on May 12, 1961, and was denied on May 25, 1961. The filing date of this petition for writ of certiorari is within ninety days of the entry of the judgments. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254 (1).

QUESTIONS PRESENTED

1. Whether a federal district court should, over objection, enter a summary judgment of dismissal of an antitrust suit, not on the merits, but solely on the strength of a wholly one-sided stipulation of counsel, if the record shows that the plaintiff had not given his attorney any authority to stipulate other than that implied by his general retainer.

2. Does not the record in this case show that the attorney involved did not intend such a one-sided stipulation?

STATEMENT OF THE CASE

PART A

In November, 1957, there were pending, at issue, in the United States District Court for the Eastern District of Pennsylvania, seven treble-damage federal antitrust cases.

These cases were alike in that the defendants were the same, and the allegations with respect to conspiracy and monopolization were the same, and all the parties were represented by the same attorneys.

The cases differed in that the plaintiffs were all different, and conducted their businesses (distribution of motion picture advertising posters) in different cities of the United States.

The basis for jurisdiction of the United States District Court was the fact that the suits were commenced pursuant to the provisions of the federal antitrust laws, viz: the Act of Congress of October 15, 1914, c. 328, 38 Stat. 731, sections 4 and 16, commonly known as the Clayton Act (15 U.S.C. sections 15 and 26), and the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, sections 1 and 2, commonly known as the Sherman Act (15 U.S.C. sections 1 and 2).

At the abovementioned time (November, 1957), one of the aforesaid seven cases (Lawlor et al. v. National Screen Service Corporation, et al., docket number 10020, hereinafter "*Lawlor*") was on the list for trial by jury.

None of the other six cases (the cases of the instant petitioners) was on the trial list.

At a number of pre-trial conferences in *Lawlor* there was much discussion of the possibility of consolidating all seven cases for trial, at least with respect to the question whether the defendants were guilty of conspiracy and monopolization in violation of sections 1 and 2 of the Sherman Act (Appendix C, *infra*, pp. 34-42).

Eventually, at a pre-trial conference held on November 4, 1957, counsel reported that they had reached an agreement, and, after much discussion—both on and off the record—the presiding judge dictated on the record a statement of his understanding of what had been agreed to, as follows (Appendix C, *infra*, pp. 40-41):

> "Counsel stipulate and agree as follows:
>
> "1. The suit of Lawlor and Pantzer trading as Independent Poster Exchange, Civil Action No. 10020, shall be tried in its entirety without a jury to final determination in this court, and that the trial of the remaining six cases shall be postponed until final determination of that case in whatever court shall become for its purposes the court of last resort.
>
> "2. Counsel for the defendants having heretofore requested a jury trial, withdraw their demand for jury trial and counsel for the plaintiff joins in that request.
>
> "The request is approved, leave to withdraw the demand is granted and leave to try without a jury is granted.
>
> "3. In the remaining six cases if, by final judgment in whatever shall have been the court of last re-

sort, it is determined in Civil Action No. 10020 that no conspiracy or unlawful monopoly existed, that finding shall be determinative of that issue in the remaining six cases. On the contrary, if such final determination therein shall be that the unlawful conspiracy or monopoly did exist, then the remaining six cases shall be consolidated for trial and tried without a jury.

"A like request for leave to withdraw demand for jury trial is made in each of those six cases, is assented to by the plaintiffs in each of those six cases. The demand is approved hereby and leave to try without jury in each of those six cases is now granted.

"Upon the trial of those cases which shall be consolidated for trial, the trial shall proceed as nearly as may be seriatim so that the evidence in the case of each plaintiff against the defendants shall be fully taken, excepting such deviations therefrom as may appear to be necessary in the discretion of the trial judge during the trial.

"Similarly, in defenses to the respective claims of the respective six plaintiffs, other than common defenses, the defendants shall offer their evidence in defense of the particular claim of the particular plaintiff. So that so far as shall be possible, the record shall show the evidence offered by the particular plaintiffs and the evidence offered by the particular defendants in defense thereof. Exceptions shall be made where the evidence offered by the defendants is in relation to a common defense to all of the claims of two or more of the plaintiffs.

"In these trials the plaintiffs shall offer their evidence in support of their allegation that they suf-

fered injury or damage by reason of the unlawful conspiracy or monopoly and evidence of the extent of the damage alleged to have been suffered.

"The defendants shall offer evidence in relation to their respective affirmative defenses as well as evidence intended to contradict or overcome the evidence offered by the plaintiffs.

"When the evidence in all six cases has been concluded the court shall thereupon make separate disposition of each of the six cases so consolidated for trial."

Manifestly, therefore, the stipulation did not call for any consolidated trial, but was only a one-sided agreement exposing the plaintiffs in the "remaining six cases" (the cases of the instant petitioners) to the risk of loss of their suits, without hearing, and without any possibility of their gaining anything whatever, no matter which side won the *Lawlor* case.

Immediately upon hearing the judge's dictation of the stipulation, however (and, therefore, before it was reduced to writing) counsel for all the parties expressed unqualified approval of and assent to it (Appendix C, *infra*, at p. 42).

Before the stipulation was dictated, however, counsel for the petitioners stated on the record that he had no express authority to enter into any agreement with respect to any case other than *Lawlor*[1] (Appendix C, *infra*, at p. 39). Neither the judge nor any of the attorneys

[1] Counsel said: ". . . I don't have express authority in any case except the Lawlor-Pantzer case . . . I felt that I must state that. That is the only qualification that I have." (Appendix C, *infra*, at p. 39).

for the defendants made any comment on this statement (id.).

Upon completion of the trial of *Lawlor* the trial judge found that the plaintiff had failed to prove that any conspiracy or unlawful monopoly existed, and, therefore, the court entered final judgment for the defendants. This judgment was affirmed on appeal, and this Court denied certiorari (*Lawlor v. National Screen Service Corporation,* 270 F.2d 146, cert. den. 362 U.S. 922), whereupon in each of the aforesaid six companion cases (the cases of the instant petitioners) the defendants filed motions for summary judgment, based solely upon the aforequoted stipulation of counsel, and, on September 22, 1960, the District Court granted these motions and entered final judgment for the defendants (R. 50).[2] On appeal to the United States Court of Appeals for the Third Circuit the cases were consolidated for briefing, and, after argument, the judgments were affirmed (R. 100-106, Appendix E, *infra,* pp. 45-51). On May 12, 1961, a timely petition for a rehearing was filed (Appendix D, *infra,* pp. 43-44) and was denied on May 25, 1961 (R. 113).

In re: Mitchel

During the trial of *Lawlor,* the aforesaid stipulation was actually construed and applied by the trial judge as follows:

In one of the aforesaid six companion cases, viz, the case of the instant petitioner David Mitchel (hereinafter "*Mitchel*") the plaintiff had filed, in the District Court, under Rule 36 of the Federal Rules of Civil Procedure,

---

[2] "R" refers to the certified copy of the record, bottom corner paging.

formal requests that the eight defendant film companies admit that they were regular subscribers to certain trade periodicals, and seven of the defendants filed written admissions as requested (R. 38).

No similar requests had been filed in *Lawlor*.

During the trial of *Lawlor* the plaintiff offered in evidence the aforesaid admissions made by the defendants in *Mitchel*.

The defendants objected to the offer on the ground that Rule 36 provides that admissions made thereunder may be used only in the case in which the admissions are made.

The trial judge sustained the objection on the ground stated.

It is not disputed that the said admissions constituted relevant and material evidence with respect to the issue of conspiracy in violation of section 1 of the Sherman Act.

In other words, it is not disputed that the admissions would have been received in evidence as material proof of conspiracy if *Mitchel* has been on trial.

More fully, the defendants' objection to the offer of the evidence was stated as follows (R. 36, *et seq.*, emphasis added):

> "Mr. Ward: . . . If your honor pleases, as I understand the offer, the plaintiffs have offered in evidence certain written answers filed by the defendant Columbia Pictures Corporation in response to requests for admissions that were put to Columbia Pictures Corporation in the case of David Mitchel

against the defendants named in civil action No. 11376.

"My first objection to the offer . . . is based, Sir, upon Rule 36 (b) of the Federal Rules of Civil Procedure, which expressly states that any admission made in a situation of this kind in response to a request for admission is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

"The words I have just used I have quoted from the rule, and I will repeat them, Sir, for clarity for the record:

'Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.'

"*It is manifest that the case which we are now trying is a proceeding other than the Mitchel case, and for that reason, Sir, it is objected to.*"

Following the foregoing, the following colloquy took place (R. 37, *et seq.*, emphasis added):

"The Court: You say that is 36B, Mr. Ward?

"Mr. Ward: Yes, sir.

The Court: What have you to say, Mr. Anderson?

"Mr. Anderson: Well, Your Honor, I think Mr. Ward's contentions are that the rule be given too narrow construction. I think that in substance, in ef-

fect, we are trying the Mitchel case in this trial, in this case, in accordance with the order made by Your Honor at the pretrial conference.

"The Court: . . . Have you read this rule?

"Mr. Anderson: Yes, I have read the rule, Your Honor.

"The Court: Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

• • • • • • • •

"It doesn't say any kindred, or it is admissible in any kindred or allied or similar proceeding, it says it shall be admissible in no other proceeding, in effect.

"Mr. Anderson: Well, I can't add anything more, Your Honor, to what I have said.

"The Court: We will sustain the objection which is made under Rule 36 (b).

• • • • • • • •

"Mr. Anderson: Well, Your Honor, I had intended to ask Your Honor, in the exercise of Your Honor's discretion, in view of the circumstances, the program in contemplation, to give the plaintiffs leave to serve Requests for Admissions on the defendants with respect to subscriptions to the trade papers that have been mentioned, and to offer those in evidence when we resume at the end of January.

"The Court: How can I do that, Mr. Anderson? We have definitely agreed that we were to make every

endeavor to conclude your evidence this week or if not before Christmas Day of next week.

• • • • • • • •

"It appears to me that it is not a matter which appeals strongly to the Court's discretion.

• • • • • • • •

"Mr. Anderson: Well, as I say, Your Honor, I don't say that I can justify my position. I can only state it.

I was surprised. Maybe I shouldn't have been surprised but *I was surprised* by the ruling.

• • • • • • • •

"The Court: My endeavor has been all along to give every reasonable leeway to both sides to make a full presentation but somewhere we must stop.

"Mr. Anderson: I realize that, Your Honor, notwithstanding—I do repeat that *I was surprised*, but I see Your Honor's point of view that I shouldn't have been surprised but *I was surprised.*

• • • • • • • •

"Mr. Anderson: . . .

"I should like to call Your Honor's attention to the fact that in a pre-trial conference, counsel agree to a statement made by Your Honor with respect to the effect of this trial on the Mitchel case and the other kindred cases, and which statement was as follows:

'3. In the remaining six cases if, by final judgment in whatever shall have been the court of last resort, it is determined in Civil Action No. 10020 that no conspiracy or unlawful monopoly existed, that find-

ing shall be determinative of that issue in the remaining six cases. On the contrary, if such final determination therein shall be that the unlawful conspiracy or monopoly did exist then the remaining six cases shall be consolidated for trial and tried without a jury.'

"I submit, if Your Honor pleases, therefore, that this trial will be determinative of the Dave Mitchell case, and that the interests of substantial justice require that if the admissions filed in that case are not admitted in this case, that the plaintiffs in this case should be given permission to file those same requests against the same defendants at this time, my contention being that that would work no kind of hardship on the defendants of any kind.

"We are quite willing to rest the case, if for instance, Your Honor would give the plaintiffs permission to reopen it and reoffer the results of such requests, if the circumstances seem to require it.

"The Court: Mr. Anderson, I can answer that very promptly. This is a trial without a jury by the consent of counsel, and by request of counsel and approval of the Court. Certainly, if I had a jury here I wouldn't keep any jury around for twenty days until you got an answer to requests for admissions filed at this very late date. That they were not filed is counsel's problem, not the court's. What were the reasons that it was not done is counsel's problem, not the court's. No meritorious explanation has been advanced for the omission.

"*However the stipulation of counsel may have been, the stipulation did not embrace any agreement that evidence which was admissible in one case not*

on trial should be admissible in the case now on trial though otherwise inadmissible therein.

"Rule 36b in my judgment precludes what you have attempted to do, and I have for that reason sustained the objection made."

And in arguing in the District Court against the defendants' motion for summary judgment in the cases of petitioners, the attorney for petitioners, inter alia, said (R. "Appellees' Appendix" pp. 6b, 7b, 8b, 9b):

"Mr. Anderson: If the Court please, . . . I think it is manifestly clear that Mitchel has not had his day in court; that his case was never on trial in any sense of the word, either technically or—

"The Court: Whether or not his case was ever on trial, Mr. Anderson, you do not now, as I read your brief, attempt in any respect to disavow the stipulation.

"Mr. Anderson: I disavow in so far as it has been construed by counsel for the defendants and I suppose now by the court. I disavow it and repudiate it absolutely in so far as it is so construed." (6b)

• • • • • • •

"The Court: Now, is there any allegation on your part presently that in stating whatever you said, as the record may show, that you lacked authority so to speak for your clients?"

"Mr. Anderson: I can answer that only by saying that it appears clearly on the record that I stated that I had no express authority to agree to anything;

that the only authority I had was such as might be implied from the fact that I was attorney of record. I had no express authority, no authority other than what could be applied, whatsoever of any kind. . . ." [7b]

• • • • • • •

"Mr. Anderson: . . . Through me the plaintiffs in the cases involved in this proceeding repudiate any agreement that I may have made to have their cases dismissed without their day in court. That would sum it up. I had no authority to make any such agreement. I never intended to do it. I don't think any agreement that I ever had made could possibly be enforced if I had agreed that their cases could be dismissed." [8b]

"The Court: . . . I am shocked and surprised that I find you now telling me that a stipulation of counsel, into which you entered in a pre-trial hearing in the Lawlor case, was entered by you without authority and that you now repudiate it and that you regard it as unenforceable."

• • • • • • •

"Mr. Anderson: For my own protection personally, I would like to say that it isn't true that I am saying as of now, and only now, that I had no authority to enter into any agreement. I stated it at the time; it is on the record, clearly stated there." [9b]

"The Court: We will examine the record.

"Mr. Anderson: I also stated during the trial of the case that I was much "surprised at the construction that the court placed on this agreement."

PART B

On June 3, 1957, the plaintiffs in the aforesaid seven cases joined each other in commencing a new action (No. 22,701), against the same defendants, solely for the purpose of bringing their claim down to date. No specific agreement to dismiss this joint case is alleged to have been made, but it has always been understood by all concerned that the disposition of this case should be governed by the disposition made of the other six cases. (Appendix B, *infra*, at p. 30).

Accordingly, the District Court dismissed this case along with the other six cases, and the judgment of dismissal was affirmed by the Court of Appeals (R. 106). As a formality, therefore, this case is included in this petition for certiorari.

REASONS FOR GRANTING THE WRIT

---

1. The decision below is in conflict with the applicable decisions of this Court: *Holker v. Parker*, 7 Cranch 436 (1813); *United States v. Beebe*, 180 U.S. 343 (1901).

2. The questions involved are of great public importance.

3. The administration of the federal anti-trust laws would be strengthened by issuance of the writ.

ARGUMENT

1.

In *Holker v. Parker*, 7 Cranch 436, supra, the attorney for the plaintiff, with no express authorization, formally agreed to a settlement of the plaintiff's claim in the amount of $5,000.00—an amount much less than the amount of the claim—and judgment was entered accordingly. No one doubted the good faith of the attorney, but apparently he acted under the mistaken belief that the defendant was insolvent. After a number of years had passed, the plaintiff sued in equity, in the Circuit Court of the United States, to set aside the judgment on the ground of lack of authority of his attorney to agree to it. The lower court dismissed the complaint, but, on appeal, the Supreme Court, in an opinion by Chief Justice Marshall, reversed, and entered judgment for the plaintiff.

Similarly, in *United States v. Beebe*, 180 U.S. 343, 351-2, *supra*, this Court, reversing the court below, vacated a judgment entered on an unauthorized agreement made by an attorney representing the United States in a civil action. In that case, this Court said:

> "[T]he power to compromise a suit in which the United States is a party does not exist with the district attorney any more than a power to compromise a private suit between individuals rests with the attorney of either party, and that such an attorney has no power to compromise a claim in suit has been frequently decided: Holker v. Parker, 7 Cranch 436. In that case it was remarked by Marshall, Chief Justice, that:

"'Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized, and being therefore in itself void, ought not to bind the injured party.'

"The same has been held in Massachusetts in Lewis v. Gamage, 1 Pick. 347; and in New York in Barrett v. Third Avenue R. Co., 45 N.Y. 628, 635, and Mandeville v. Reynolds, 68 N.Y. 528, 540. And see Kilmer v. Gallagher, Supreme Court of Iowa, December 22, 1900, 52 Cent. L. J. 150, and note Bigler v. Toy, 68 Iowa 688. Indeed the utter want of power of an attorney, by virtue of his general retainer only, to compromise his client's claim, cannot, we think, be successfully disputed."

The foregoing cases have been cited by other federal courts down to modern times: *Ricketts v. Pennsylvania R. Co.*, 153 F2d 757 (Cir. 2, 1946); *In Re Gsand*, 153 F2d 1001 (Cir. 3, 1946); *Petition of Trinidad Corporation*, 229 F2d 423, 429-30 (Cir. 2, 1955).

The court below failed to distinguish, or even to cite, any of the above-cited cases. In the opinion filed by that court, it was acknowleged that (Appendix A, *infra*, at p. 28a):

> "Counsel . . . cites us cases holding that a lawyer without authorization cannot compromise the client's case."

But instead of discussing those cases, the court merely said that (id.):

> "The agreement made among counsel was no compromise of a lawsuit. It was, instead, a common sense way of handling several cases involving the same points."

Obviously, the court's statement does not help to answer the question presented.

Indeed, it seems clear that the court below misapprehended the most basic facts of the case, because, in its opinion, the court incorrectly said that (Appendix A, *infra*, p. 28):

> "Defendants took their chances on judgments against them in seven cases if the *Lawlor* case was won."

The plain fact is that defendants took no such chances because all that the agreement of counsel provided was that if the *Lawlor* case "was won," the other cases would go on to trial in regular course.[3] Indeed, this is evident

---

[3] Moreover, even if the agreement had been as bilateral as the court apparently thought it to be, it is still very doubtful that it would be binding on petitioners, because the effect of the agreement would still be unilaterally to cut off the petitioners from the right to a hearing, as was demonstrated by the ruling made with respect to the petitioner Mitchel.

The fact is that the one and only lawful way for the trial court to have dealt with the situation before it was to order the cases consolidated for trial, and that is obviously what petitioners' counsel believed had been ordered.

even from that part of the agreement that the court below quoted (Appendix A, *infra*, at p. 30). It follows that, in its most vital aspect, the opinion below is defective on its face.[4]

Another indication that the court below misunderstood the facts of these cases is that not so long ago that court delivered in another case a very relevant opinion, quoting and following what was said by this Court in *Holker v. Parker*, supra, and adding the following (*In Re Gsand*, 153 F2d 1001, 1005-6, Cir. 3, 1946, *supra*):

> "Federal decisions construing Rule 60(b) are in much the same vein. In Preveden v. Hahn, D.C.S.N.Y., 36 F. Supp. 952, there was a plaintiff's motion to vacate an order of dismissal of his complaint which had been entered by stipulation of counsel. The court said at page 953 of 36 F. Supp.:
>
> 'The attorney for the plaintiff, who signed the consent dismissing the action, admits in an affidavit on file that he had no express authority to do so, and this is the fact. Defendants apparently do not claim otherwise, but contend that such authority existed by implication in the attorney's retainer. In this connection the defendants are wrong. An attorney has no right to settle his client's case nor to consent to a dismissal of it upon the merits, which in effect is a release of the claim, without express authority from his client. No such authority is implied in a mere retainer. White v. Joyce, 158 U.S. 128, 129, 15 S. Ct. 788, 39 L. Ed. 921; Kingsbury v. Buckner, 134 U.S. 650, 10 S. Ct. 638,

[4] The error was pointed out in a petition for rehearing (Appendix D, infra, pp. 43-44) that was denied without comment (R. 113).

33 L. Ed. 1047; United States v. Beebe, 180 U.S. 343, 21 S. Ct. 371, 45 L. Ed. 563; Schram v. Poole, 9 Cir., 111 F 2d 725; Countryman v. Breen, 241 App. Div. 392, 271 N.Y.S. 744. The order in question was therefore not valid and the plaintiff did not learn of its entry until several months has passed.' "

Clearly, therefore, the decision below is in conflict with the decisions of this court, with the decisions of courts of appeals of other circuits and with its own decisions.

2.

The point involved is clearly of great public importance, for the integrity of the administration of justice is at stake in a most vital respect. The question is whether an attorney at law should be deemed to have implied power, based on his general retainer only, to agree to the entry of a consent judgment of dismissal of a claim *actually in suit* in a federal court. It will be noticed that in the Opinion delivered by this Court in *United States v. Beebe*, 180 U.S. 343, *supra*, the Court emphasized that the case that it was engaged in reinstating was a case that was "in suit" (180 U.S. at p. 351). The sense of the matter seems to be that whatever may be the implied power of an attorney to settle or release a claim that has not reached the stage of litigation, no attorney should be deemed authorized by implication to agree to entry of a judgment of dismissal of a claim *in suit*. In other words, the law rightly provides that anyone vigilant enough to have had his claim brought before the court in the form of a suit is entitled to assume that the court will not dismiss his case on the basis of an agreement improvidently or deceitfully made by his attorney, in his absence, and without

notice to him. As stated, in effect, by Chief Justice Marshall, there is always the danger that an attorney who has given his clients' rights away will be found, on investigation, to have acted as a result of his judgment having been "imposed on, or not fairly exercised,"[5] and it would certainly be contrary to public policy to allow to stand a judgment of a court so feebly supported.

3.

The public importance of the principle involved is heightened by the fact that the instant cases owe their existence to the provisions of the antitrust laws. Indeed, this court very recently said (*United States v. DuPont De Nemours & Co.*, U.S. , , May 22, 1961):

> "The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial."

How then can the disposition heretofore made, for instance, of petitioner Mitchel's case be tolerated:

Mitchel's case was dismissed on the ground that the Lawlor case was dismissed.

But Mitchel would have gained nothing if Lawlor had won, and, more importantly, the record shows that if and when Mitchel is permitted to have a trial of his case he will be able to adduce evidence which was unavailable to Lawlor.

The respondents fought relentlessly to keep Mitchel's proofs out of the trial of *Lawlor* (*supra*, pp. 9-15), and

---

[5] *Holker v. Parker*, 7 Cranch 436, 452 *supra*.

therefore it would be to give them a most "unfair advantage" to let them succeed in their effort to defeat Mitchel on the ground that they had defeated Lawlor.

It is regrettable that the Court of Appeals took no notice of the demonstration of unfairness provided by the Mitchel case. That court deemed it sufficient to observe that the District Court could have ordered a consolidated trial of all the cases, but the court seems not to have realized that if there had been a consolidated trial, all of the petitioners, including particularly Mitchel, would have had a right to be heard. In other words, if the District Court had ordered a consolidated trial there would be no occasion for the filing of this petition. But since there was no consolidation, there has been no trial of the case of Mitchel, or of the cases of the other petitioners, and therefore they have been denied their constitutional right to their day in court.

The Opinion filed by the District Court shows that that court was not unmindful of the significance of the problem posed by the facts of the Mitchel case, but the court seems not to have fully understood the point, for the court said (Appendix B, *infra*, p. 32):

> "Plaintiffs assert that they have not had their day in court. They urge the fact that at the Lawlor trial, on objection, we excluded certain evidence inadmissible in the Lawlor trial which might have been admissible in the trial of one of the six companion cases. Our ruling was clearly correct for the reason, as was then stated, that 'the stipulation did not embrace that evidence which was admissible in one case not on trial should be admissible in the case now on trial though otherwise inadmissible therein.'"

The court seems to have missed the point that even though it be assumed that the court was right in rejecting the proffered evidence in *Lawlor*, it does not follow that the court was right in dismissing *Mitchel* on the basis of the dismissal of *Lawlor*.

It therefore seems clear that there has not been a proper disposition of these antitrust cases.

CONCLUSION

For the foregoing reasons this petition for issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

FRANCIS T. ANDERSON,

Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 13,448 to 13,454, inclusive

Morris W. Lipp, trading as Midwest Poster Exchange,

Appellant in No. 13,448

Benjamin Siegel, trading as Theatre Advertising Company,

Appellant in No. 13,449

Fannie Schrader, Administratrix of the Estate of Jay Schrader, trading as Charlotte Poster Exchange, Deceased,

Appellant in No. 13,450

David Mitchel, trading as Southwest Poster Service,

Appellant in No. 13,451

Jacob Riff,

Appellant in No. 13,452

Harry Vogelstein, trading as Baltimore Poster Company,

Appellant in No. 13,453

v.

National Screen Service Corporation; Loew's Incorporated; Twentieth Century Fox Film Corporation, RKO

Radio Pictures, Inc.; Columbia Pictures Corporation; United Artists Corporation; Warner Brothers Pictures, Inc.; Warner Bros. Picture Distributing Corporaton; Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Universal Pictures Company, Inc.; Universal Film Exchanges, Inc.

Charles Lawlor and Mitchell Pantzer, co-partners trading as Independent Poster Exchange; Morris J. Lipp, trading as Midwest Poster Exchange; Benjamin Siegel, trading as Theatre Advertising Company; Jay Schrader, trading as Charlotte Poster Exchange; Dave Mitchell, trading as Southwest Poster Service; Jacob Riff; Harry Vogelstein, trading as Baltimore Poster Company,

Appellants in No. 13,454

v.

National Screen Service Corporation; Loew's Incorporated; Twentieth Century Fox Film Corporation; RKO Radio Pictures, Inc.; Columbia Pictures Corporation; United Artists Corporation; Warner Brothers Pictures, Inc; Warner Bros. Picture Distributing Corporation; Paramount Film Distributing Corporation; Universal Film Exchanges, Inc.

Appeals from the United States District Court for the Eastern District of Pennsylvania

---

Argued April 18, 1961

Before Goodrich, Kalodner and Staley, *Circuit Judges.*

Appendix A—Opinion Filed May 2, 1961

OPINION OF THE COURT

(Filed May 2, 1961)

Per Curiam:

In the District Court for the Eastern District of Pennsylvania, there were seven cases brought against a group of defendants, the principal one of which was National Screen Service Corporation. These seven cases, separately brought, all alleged the same claim against the defendants. There had been a series of pretrial conferences between the trial judge and the lawyers for the parties, the plaintiffs all being represented by the same counsel. At the conclusion of the last of these conferences a stipulation was entered into. One of the provisions was that the demand for jury trial was dropped. Paragraph 3 of the stipulation provides:

> "In the remaining six cases if, by final judgment in whatever shall have been the court of last resort, it is determined in Civil Action No. 10620 that no conspiracy or unlawful monopoly existed, that finding shall be determinative of that issue in the remaining six cases. On the contrary, if such final determination therein shall be that the unlawful conspiracy or monopoly did exist, then the remaining six cases shall be consolidated for trial and tried without a jury."

This stipulation was agreed to before the court by all the lawyers concerned in the case.

The Civil Action referred to in the above quoted paragraph was the Lawlor case. This was tried in the district court and resulted in full findings of fact and conclusions of law unfavorable to the plaintiffs. The district

court's judgment was affirmed by this Court in an opinion reported at 270 F. 2d 146 (1959). Certiorari was denied by the Supreme Court, 362 U.S. 922 (1960). The trial judge then entered summary judgment for the defendants in the other six cases in accordance with the stipulation quoted above. The plaintiffs appeal. Counsel says that he had no authority to enter into such a stipulation and cites us cases holding that a lawyer without authorization cannot compromise the client's case.

The agreement made among counsel was no compromise of a lawsuit. It was, instead, a common sense way of handling several cases involving the same points. The judge could have ordered a consolidated trial for all of them. See Fed. R. Civ. P. 42(a), 28 U.S.C. It was considered more feasible to handle the litigation in the manner stipulated for. Defendants took their chances on judgments against them in seven cases if the Lawlor case was won. Plaintiffs took their chances on losing if the Lawlor case was lost. There is no doubt in our minds that this arrangement to expedite this litigation to final conclusion was well within the authority of the lawyers who participated.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

In the United States District Court
for the Eastern District of Pennsylvania

No. 11,136 Civil Action

Morris J. Lipp, trading as Midwest Poster Exchange

vs.

National Screen Service Corporation, et al.

Filed 9 22 60

OPINION

Kraft, J. September 22, 1960

This action is one of seven closely related actions all of which are before us on defendants' motions for summary judgment, inter alia. Since, in our view, defendants are entitled to judgment, other questions argued become moot.

All seven actions are private antitrust suits which are factually identified with Lawlor v. National Screen Service Corp. et al., Civil Action No. 10,020 ("Lawlor"). *Six* of the cases[1] were commenced in 1950, soon after the

[1] Nos. 11,136 (the instant case), 11,137, 11,138, 11,376, 11,597 and 11,678.

original Lawlor action. In each of the six, action was brought against the same defendants as in Lawlor and, in each, respective counsel were the same as in Lawlor.

At pre-trial conferences held in October and November 1957, prior to the trial of the Lawlor case, we noted the pendency of the six companion cases, and suggested that the parties endeavor to reach some agreement which would obviate the necessity to retry in any of the companion cases certain of the issues to be litigated in the Lawlor case. After extensive discussion of the matter, the parties came to an agreement which we dictated on the record in their presence at the pre-trial conference of November 4, 1957. The pertinent part of that agreement reads:

> "In the remaining six cases if, by final judgment in whatever shall have been the court of last resort, it is determined in Civil Action No. 10,020 that no conspiracy or unlawful monopoly existed, that finding shall be determinative of that issue in the remaining six cases. On the contrary, if such final determination therein shall be that the unlawful conspiracy or monopoly did exist, then the remaining six cases shall be consolidated for trial and tried without a jury."

At the pretrial conference, counsel for the defendants called our attention to Civil Action No. 22,707, the *seventh* case now before us. That action was commenced in 1957, and differs from the other six cases only in one respect. In No. 22,707, the plaintiffs in the other six cases, together with the plaintiffs in the Lawlor case, acting through their same counsel, filed a single complaint containing seven separate counts, one for each of the plain-

tiffs in the original seven cases. Each count claims damages for a designated plaintiff for the period subsequent to the commencement of the original case brought by that plaintiff.

It was agreed, after some discussion that no express stipulation respecting No. 22,707 was necessary. The following colloquy occurred:

> "Mr. Anderson: • • • as a practical matter, that suit being merely supplemental to this suit, as Mr. Mullinix says, and Mr. Ward, it simply carries on, it simply brings the other case down to date. And, certainly, if, as we have assumed, for instance, that the court finds that there is no liability here, no violation of the Sherman Act, this second suit will certainly be dead when its parent dies.
>
> • • • • • • • •
>
> "Mr. Nizer: • • • I agree with Mr. Ward and Mr. Anderson that when Your Honor has disposed of this matter this will fall into place in some way for quick disposition."

The Lawlor case was tried in November and December 1957, and January 1958, and resulted in judgment for the defendants. The conclusions of law, following 140 findings of fact and forming the basis for that determination, included the following:

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act.
>
> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."

On plaintiffs' appeal, the judgment was affirmed without dissent, 270 F. 2d 146 (3rd Cir. 1959). The Supreme Court denied plaintiffs' petition for certiorari, 362 U.S. 922 (1960), and the time for a request for rehearing thereon expired April 15, 1960.

On April 29, 1960, defendants filed motions for summary judgments in the six companion cases. The motions were based on the judgments in favor of the defendants as to the monopoly and conspiracy issues in the Lawlor case, and on the stipulated binding effect of that determination in the six companion cases.

On May 18, 1960, defendants moved for summary judgment in No. 22,707, on the ground that the final judgment in the Lawlor case, made binding on the plaintiffs in the six companion cases by the pretrial stipulation, was dispositive of those same plaintiffs' claims in No. 22,707.

Since the issues of liability were determined adversely to the plaintiffs in Lawlor, the clear and unequivocal terms of the pretrial agreement require judgments for the defendants in the six companion cases, which were expressly made the subject of the agreement. Plaintiffs' contentions to the contrary are wholly devoid of merit.

Plaintiffs assert that they have not "had their day in court." They urge the fact that at the Lawlor trial, on objection, we excluded certain evidence inadmissible in the Lawlor trial which might have been admissible in the trial of one of the six companion cases. Our ruling was clearly correct for the reason, as we then stated, that "the stipulation did not embrace any agreement that evidence which was admissible in one case not on trial should be admissible in the case now on trial though otherwise inadmissible therein."

Plaintiffs further contend that the judgment of dismissal in Lawlor "was based, in large part, on dozens of the court's findings of fact peculiar to the plaintiffs in that case, and, therefore, totally inapplicable to any of the cases involved in these proceedings." Even if such be the fact, it affords no sufficient reason to nullify a stipulation clear and unequivocal in its terms, free of any limitation or qualification and entered into only after the most thoughtful and prolonged consideration and discussion among counsel. The actions had then been pending for some seven years and Lawlor had already had, before trial, a noteworthy appellate history. Presumably, all of the mature, experienced and able counsel were quite aware of the existing factual circumstances in each of the cases and none would have hesitated to insist upon appropriate reservations, conditions or qualifications to the stipulation, had a substantial difference in facts in any case so required.

Once judgments have been entered in the six companion cases, it follows that defendants are entitled to judgment in No. 22,707, since, as plaintiffs' counsel express it, "this second suit will certainly be dead when its parent dies."

ORDER

NOW, September 22, 1960, it is ordered and decreed that defendants' motion for summary judgment be, and it is granted, and judgment is entered for defendants.

(s) C. William Kraft, Jr.
Judge

APPENDIX C

EXCERPTS FROM TRANSCRIPTS OF PRETRIAL CONFERENCES IN LAWLOR V. NATIONAL SCREEN SERVICE CORP.

THE COURT: Gentlemen, there are some preliminary questions I should like answered at the outset, in view of the fact that I am inheriting this after a series of other judges and other procedure with which you are all quite familiar.

Mr. Anderson, I note that there are some other cases, evidently companion cases to this. How many of them are there?

MR. ANDERSON: There are six others.

THE COURT: Is it proposed that those cases be consolidated for trial with this one, or is it proposed that any stipulation be entered into that the result of this one, on the question of liability, shall be determinative of those cases on the like issue?

• • • • • • • • • • •

I would certainly suggest to counsel that they consider the possibility of a stipulation which might provide that the other cases, if the issues in them are substantially the some or identical, be determined by the determination of the identical issues in this case. It seems to me, if the plaintiffs are in almost the same position as the present plaintiffs and the defendants are the same,

that it is a labor scarcely of love to retry the same issue constantly in cases that are of the protracted type that this is.

Saying no more on that subject, I leave the suggestion with you.

• • • • • • • • • • •

THE COURT: At the moment let me state this as my thinking, without indicating any determination of it.

It seems just an unnecessary task to me to have seven cases tried involving almost identical issues when the anticipated trial time of this case is expected to be somewhere in the neighborhood of five weeks or less. My thinking is that it might be well for the court, if counsel do not stipulate, or upon making the effort are unable to stipulate, to order, one, a consolidation of the cases for trial, and, two, a severance of the issue of liability from that of damages, and proceed with the trial of all the consolidated cases first on the issue of liability. If that is determined favorably to the plaintiff, to proceed forthwith with the damage issue. If it is decided adversely to the plaintiff, that eliminates the necessity of determination of the damage issue.

Now, Mr. Anderson, is there in your viewpoint anything that would substantially prejudice the plaintiffs were that done?

• • • • • • • • • • •

MR. ANDERSON: Well, I should think it would be, Your Honor. I would much prefer—

THE COURT: I know what you would prefer. I know always what counsel prefers, to take a bit at a time. But we have not only the right of these litigants to con-

sider but the rights of many other litigants, and there are some odd thousand undisposed of cases here, and unless there is really a substantial prejudice which would result to a litigant from a consolidation of the cases for trial, it just appears fruitless to have seven trials.

MR. ANDERSON: I see no reason why there should not be an agreement that the result of this case shall be binding on the other cases, which would permit us to try this case fully and entirely at one time. As I say, I see no reason why there should not be such an agreement, Your Honor.

• • • • • • • • • •

THE COURT: I will not pursue that further except to say this, in consequence of this phase of it, I will try, before we conclude today, to fix a further conference before the date already set for the next one, at or before which time I will want to be advised by counsel on both sides definitely whether they can agree that the trial of this case as to designated issues shall be determinative of the issues in the six remaining cases. And in the event of their failure or inability so to agree, I want counsel prepared to show cause why the Court, acting sua sponte, should not enter an order consolidating the seven cases for trial and severing the issue of liability with that of damages.

• • • • • • • • • •

THE COURT: Well, what would happen then if I entered an order to consolidate these cases for trial? Chaos?

MR. MULLINIX: Yes, Your Honor, chaos is the word, I think. There are a lot of reasons why we think such an order would be seriously prejudicial, and if we

were at that point we would argue to Your Honor the reasons why we think that there should not be a consolidation order.

• • • • • • • • • •

MR. ANDERSON: Your Honor, I should think that there would be no chaos at all, I must disagree with my friend Mr. Mullinix, if we tried the question of liability in all the cases. I think these distinctions are more theoretical than real. There are these differences but I think they don't result in any legal distinctions.

I want to get on, however. I am willing that we should try them all on the liability, especially if we could try completely the Lawlor-Pantzer case at the same time. I submit that if that is where we are headed, that that is a distinct possibility, and I will ask the court to do that if that is where we are going to wind up; try all the cases with respect to liability and try the Lawlor-Pantzer case completely with respect to damage also.

• • • • • • • • • •

THE COURT: Gentlemen, it is my disposition that unless you can agree on a stipulation . . . to obviate the necessity of setting separate trials, I propose at our next pretrial, the date of which is already fixed, to enter an order consolidating these cases for trial and limiting the issues which will be tried in that trial, to separate the issue of damages from the remaining issues.

• • • • • • • • • •

I will not enter the order today because evidently both sides have been working on it and giving it thought. It appears to me that you are not too far apart. But if you are unable to reach such an agreement by Monday next, I think is the time of our scheduled pretrial, you

have notice that I will then enter an order consolidating the seven cases for trial and separating the issues which will be tried at the first bite of this litigation. Some of you may prefer not to do that, some of you may, but I think that some more concerted effort is desirable on the part of counsel to try to reach an agreement by which in large part the critical issues which can be determined for all the cases by the trial of one may be agreed to be so resolved.

With that I will leave that situation and request you gentlemen to continue your conference and negotiation to see whether or not you can't consummate such an agreement at or before that next pre-trial conference.

• • • • • • • • •

THE COURT: Now to get back to the point that we have discussed at these pretrials almost initially. Have counsel been able to come to any agreement respecting the effect of the pending suit on the other six?

• • • • • • • • •

MR. ANDERSON: Judge Kraft, we have been meeting almost constantly here. I think if you knew all of the facts you would say that we have been striving valiantly to reach a solution, and the more we talk the more difficult, as we found— Wait, I am the bearer of good news, sir. We all got together this morning—I have startling good news. I think, at least we agree on one thing here apparently. We have all concluded, sir, after batting it back and forth, that the one way to solve all those difficulties is for everybody to agree to waive a jury trial, and we have agreed to do it, which I think solves all our—

THE COURT: You mean in this case or in the other cases?

MR. ANDERSON: In all of them.

I only have this much to qualify that with. I don't have express authority in any case except the Lawlor-Pantzer case, but I think I have implied authority, and I have no doubt that the clients will be in accord with that. That is that I have express authority in the Lawlor-Pantzer case and I am sure that as a practical matter my authority extends to the seven. But I felt that I must state that. That is the only qualification that I have.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Back on the record.

Do all of counsel for the defendants, having heard Mr. Anderson's statement, affirm it?

MR. WARD: For those defendants for whom I speak, sir, I do affirm Mr. Anderson's statement that the cases may be tried without a jury before Your Honor.

MR. GOFFMAN: I do, too.

MR. NIZER: As I understand it, when we say "the cases," the Lawlor case will still be tried by itself but the stipulation goes for all, isn't the way it began?

MR. ANDERSON: Yes.

MR. WARD: It is my understanding that the Lawlor case will be tried in its entirety, both as respects questions of liability and damages, and that the issue in the Lawlor case as respects the question whether there has been a violation by the defendants, or any of them, of the Sherman Act shall be applicable to the other cases of the six plaintiffs that are pending.

I am not clear, however, and I offer this for comment by others interested as to Your Honor's thought with regard to the subject of damages in the other six plaintiffs' cases.

THE COURT: Let us go off the record for a moment.

(Discussion off the record)

THE COURT: On the record.

Counsel stipulate and agree as follows:

1. The suit of Lawlor and Pantzer trading as Independent Poster Exchange, Civil Action No. 10020, shall be tried in its entirety without jury to final determination in this court, and that the trial of the remaining six cases shall be postponed until final determination of that case in whatever court shall become for its purposes the court of last resort.

2. Counsel for the defendants having heretofore requested a jury trial, withdraw their demand for jury trial and counsel for the plaintiff joins in that request.

The request is approved, leave to withdraw the demand is granted and leave to try without a jury is granted.

3. In the remaining six cases if, by final judgment in whatever shall have been the court of last resort, it is determined in Civil Action No. 10020 that no conspiracy or unlawful monopoly existed, that finding shall be determinative of that issue in the remaining six cases. On the contrary, if such final determination therein shall be that the unlawful conspiracy or monopoly did exist, then the remaining six cases shall be consolidated for trial and tried without a jury.

A like request for leave to withdraw demand for jury trial is made in each of those six cases, is assented to by the plaintiffs in each of those six cases. The demand is approved hereby and leave to try without a jury in each of those six cases is now granted.

Upon the trial of those cases which shall be consolidated for trial, the trial shall proceed as nearly as may be seriatim so that the evidence in the case of each plaintiff against the defendants shall be fully taken, excepting such deviations therefrom as may appear to be necessary in the discretion of the trial judge during the trial.

Similarly, in defenses to the respective claims of the respective six plaintiffs, other than common defenses, the defendants shall offer their evidence in defense of the particular claim of the particular plaintiff. So that so far as shall be possible, the record shall show the evidence offered by the particular plaintiffs and the evidence offered by the particular defendants in defense thereof. Exceptions shall be made where the evidence offered by the defendants is in relation to a common defense to all of the claims of two or more of the plaintiffs.

In these trials the plaintiffs shall offer their evidence in support of their allegation that they suffered injury or damage by reason of the unlawful conspiracy or monopoly and evidence of the extent of the damage alleged to have been suffered.

The defendants shall offer evidence in relation to their respective affirmative defenses as well as evidence intended to contradict or overcome the evidence offered by the plaintiffs.

When the evidence in all six cases has been concluded the Court shall thereupon make separate disposition of each of the six cases so consolidated for trial.

MR. ANDERSON: I subscribe to that.

THE COURT: Do you agree to that on behalf of your client?

MR. ANDERSON: I agree on behalf of the plaintiff.

MR. WARD: I so agree, sir.

MR. GOFFMAN: Yes, it is agreeable, Your Honor.

THE COURT: How about you, Mr. Nizer?

MR. NIZER: I think that is satisfactory, Your Honor. I think it is an admirable statement of the situation. I think there are refinements here and there that crop up, but I think that Mr. Anderson was quite right when he said that he stated the principle that, now that a jury is waived, it would be in Your Honor's hands anyhow for any circumstance that develops.

• • • • • • • • •

APPENDIX D

PETITION FOR REHEARING

Come now, the abovenamed plaintiffs-appellants and pray the court to grant a rehearing herein for the following reasons:

1.

The court's opinion discloses a very material mistake of fact.

That is to say, the opinion states that under the agreement of counsel:

> "Defendants took their chances on judgments against them in seven cases if the *Lawlor* case was won."

But there is no such provision in the agreement.

On the contrary, the agreement expressly provided that if the *Lawlor* case was won the defendants would still be entitled to defend petitioners' cases in all respects. (See the six, unnumbered, paragraphs of the agreement immediately following the paragraph, No. 3, quoted in the opinion of the court.)

2.

The opinion is completely silent with respect to the fact that the trial court construed the agreement as authorizing the court to dismiss petitioner Mitchel's case for want of evidence notwithstanding the unchallenged

fact that the court rejected relevant and material evidence which was offered on behalf of Mitchel, and which undoubtedly would have been received by the court if Mitchel's case had been on trial.

On the other hand, there is nothing in the agreement of counsel exposing any defendant to the risk of having any case decided against it without having full opportunity to have all of its relevant and material evidence heard and considered by the court.

Wherefore allowance of a rehearing is respectfully requested.

FRANCIS T. ANDERSON
Attorney for Petitioners

APPENDIX E

United States Court of Appeals
For the Third Circuit

No. 13,448

Morris W. Lipp, trading as Midwest Poster Exchange,
Appellant

vs.

National Screen Service Corporation et al.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Goodrich, Kalodner and Staley, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

May 2, 1961

Appendix E—Judgments

United States Court of Appeals

For the Third Circuit

No. 13449

Benjamin Siegel, trading as Theatre Advertising Company,

Appellant

vs.

National Screen Service Corporation et al.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Goodrich, Kalodner and Staley, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

May 2, 1961

Appendix E—Judgments

United States Court of Appeals

For the Third Circuit

No. 13450

Jay Schrader, trading as Charlotte Poster Exchange,
Appellant

vs.

National Screen Service Corporation et al.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Goodrich, Kalodner and Staley, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

May 2, 1961

Appendix E—Judgments

United States Court of Appeals

For the Third Circuit

No. 13451

David Mitchel, trading as Southwest Poster Service,
Appellant

vs.

National Screen Service Corporation et al.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Goodrich, Kalodner and Staley, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

May 2, 1961

Appendix E—Judgments

United States Court of Appeals

For the Third Circuit

No. 13452

Jacob Riff,

Appellant

vs.

National Screen Service Corporation et al.

On Appeal from the United States District Court
For the Eastern District of Pennsylvania

Present: Goodrich, Kalodner and Staley, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

May 2, 1961

Appendix E--Judgments

United States Court of Appeals

For the Third Circuit

No. 13,453

Harry Vogelstein, trading as Baltimore Poster Company,
Appellant

vs.

National Screen Service Corporation et al.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Goodrich, Kalodner and Staley, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

May 2, 1961

Appendix E– Judgments

United States Court of Appeals

For the Third Circuit

No. 13,454

Charles Lawlor and Mitchell Pantzer, co-partners trading as Independent Poster Exchange et al.

Appellants

vs.

National Screen Service Corporation et al.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Goodrich, Kalodner and Staley, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

May 2, 1961

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 1 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961.

No. 269.

MORRIS J. LIPP, trading as MIDWEST POSTER EXCHANGE; BENJAMIN SIEGEL, trading as THEATRE ADVERTISING COMPANY; FANNIE SCHRADER, Administratrix of the Estate of Jay Schrader, Deceased; DAVE MITCHEL, trading as SOUTHWEST POSTER SERVICE; JACOB RIFF; HARRY VOGELSTEIN, trading as BALTIMORE POSTER COMPANY; and CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,

Petitioners,

v.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORPORATION, METRO-GOLDWYN-MAYER INC. (formerly Loew's Incorporated), PARAMOUNT FILM DISTRIBUTING CORPORATION, RKO GENERAL, INC. (formerly RKO Radio Pictures, Inc.), TCF FILM CORPORATION (formerly Twentieth Century-Fox Film Corporation), UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., and WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

LOUIS NIZER,
WALTER S. BECK,
1501 Broadway,
New York 36, New York,
LOUIS J. GOFFMAN,
12th Floor Packard Building,
Philadelphia 2, Pennsylvania,
W. BRADLEY WARD,
EDWARD W. MULLINIX,
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Attorneys for Respondents.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON,
WOLF, BLOCK, SCHORR & SOLIS-COHEN,
SCHNADER, HARRISON, SEGAL & LEWIS,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

TABLE OF CONTENTS.

	Page
OPINIONS BELOW	2
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT	10
I. The Petition Fails to Advance any Ground Justifying a Grant of Certiorari	10
II. The Courts Below Correctly Interpreted and Applied the Stipulation	11
CONCLUSION	17

TABLE OF CASES CITED.

	Page
Fields v. United States, 205 U. S. 292 (1907)	11
Holker v. Parker, 7 Cranch 435 (U. S. 1813)	11, 12
Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387 (1923)	11
Lawlor v. National Screen Service Corp., et al., U. S. D. C., E. D. Pa., Civil Action No. 10,020; 270 F. 2d 146 (3d Cir. 1959); 362 U. S. 922 (1960) (No. 558 Misc., Oct. T. 1959)	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16
United States v. Beebe, 180 U. S. 343 (1901)	11

IN THE

Supreme Court of the United States.

No. 269.

OCTOBER TERM, 1961.

MORRIS J. LIPP, TRADING AS MIDWEST POSTER EXCHANGE; BENJAMIN SIEGEL, TRADING AS THEATRE ADVERTISING COMPANY; FANNIE SCHRADER, ADMINISTRATRIX OF THE ESTATE OF JAY SCHRADER, DECEASED; DAVE MITCHEL, TRADING AS SOUTHWEST POSTER SERVICE; JACOB RIFF; HARRY VOGELSTEIN, TRADING AS BALTIMORE POSTER COMPANY; AND CHARLES LAWLOR AND MITCHELL PANTZER, CO-PARTNERS TRADING AS INDEPENDENT POSTER EXCHANGE,

Petitioners,

v.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORPORATION, METRO-GOLDWYN-MAYER INC. (FORMERLY LOEW'S INCORPORATED), PARAMOUNT FILM DISTRIBUTING CORPORATION, RKO GENERAL, INC. (FORMERLY RKO RADIO PICTURES, INC.), TCF FILM CORPORATION (FORMERLY TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., AND WARNER BROS. PICTURES DISTRIBUTING CORPORATION.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the district court is reported at 188 F. Supp. 245 (1960). The opinion of the Court of Appeals is reported at 290 F. 2d 321 (1961).

QUESTION PRESENTED.

Was the district court right in giving effect in these cases to a pretrial agreement, formulated with the express consent of all counsel and stated of record by the district court, stipulating that the adjudication of certain factual issues in the trial of the earliest of eight treble damage actions—all concededly instituted "on the same grounds" against the same defendants—should be dispositive of identical factual issues in the other cases?

STATEMENT.

The petition for certiorari seeks review of seven judgments of the court of appeals affirming judgments of the district court for the defendants in seven private antitrust actions. The actions are factually identified with and were concededly brought on the basis of "allegations with respect to conspiracy and monopolization [which] were the same"[1] as in **Lawlor v. National Screen Service Corp., *et al.*,**[2] (hereinafter referred to as the **Lawlor** case). The **Lawlor** case was fully tried, resulting in findings that none of the defendants had violated the antitrust laws. The judgment for the defendants in **Lawlor** was affirmed by the court below, 270 F. 2d 146 (3d Cir. 1959), and this Court denied certiorari, 362 U. S. 922 (1960).

Six of the seven judgments which are the subject of the petition for certiorari are in cases[3] commenced in

1. Petition, p. 4.

2. Civil Action No. 10,020 in the United States District Court for the Eastern District of Pennsylvania.

3. Those of petitioners Lipp, Siegel, Schrader, Mitchell, Riff and Vogelstein.

1950 (1a),[4] soon after commencement of the **Lawlor** case.[5] In all of them the cause of action rested on the same legal and factual bases as the cause of action alleged in **Lawlor**, and all petitioners, as well as the plaintiffs in **Lawlor**, have at all times been represented by the same counsel, Francis T. Anderson, Esquire.

At a pretrial conference in the **Lawlor** case in October 1957, Judge Kraft, the trial judge, took note *sua sponte* of the pendency of these six companion cases. He urged the parties to attempt to reach an agreement which would prevent any possibility that the issues to be litigated in **Lawlor** would have to be relitigated in any of the companion cases (2a).[6]

At the next pretrial conference, counsel reported to Judge Kraft that they had been unable to come to any agreement. As petitioners' counsel said, "it would seem very unlikely that we could come to any definite understanding" (3a). Counsel indicated that their discussion

---

4. Page references carrying an "a" or "b" suffix are to the court of appeals appendices of the appellants and appellees in that court, respectively.

5. The seventh case, i.e., petitioners Lawlor, *et al.*, is an action, brought in 1957, in which the plaintiffs in the other six cases, together with the plaintiffs in **Lawlor**, filed a single complaint containing seven separate counts, one for each of the plaintiffs in the original seven cases, realleging the same causes of action, respectively, for the period subsequent to the commencement of the original action brought by that plaintiff. No further reference need be made to that action since the parties are in agreement, as stated at page 10 of the petition, that disposition of that case is governed by the disposition of the other six.

6. In "Appendix C" to the petition for certiorari, petitioners set forth excerpts from the pretrial conferences in the **Lawlor** case. These excerpts are not complete; they omit portions relating to the problem presented by the pendency of seven cases involving identical issues as to liability. For that reason, references in this Statement will be made to the Appendix for Appellants in the court below, which sets forth the relevant portions of the pretrial conferences in their entirety.

had been along the lines of "trying all the cases at this time" (4a)—*i.e.*, consolidating them for trial—a procedure which was opposed by petitioners' counsel (4a, 5a) as "substantially prejudicial" to petitioners' interest (6a) and was opposed by respondents' counsel as well, as they later indicated (11a).

Upon hearing counsel's report, Judge Kraft expressed disappointment at their failure "to resolve at least the liability questions in all of the cases by a stipulation to make the factual determinations, where the issues are identical, in this case [**Lawlor**] determinative of the factual issues in the other cases" (4a).

Following further discussion, petitioners' counsel, Mr. Anderson, told the trial court that, "If they [the respondents] are offering to let this case control the others, I think that we can agree to that" (5a). A few moments later, petitioners' counsel reiterated—after voicing objection to the idea of consolidating the cases—that he saw "no reason why there should not be an agreement that the result of this case [**Lawlor**] shall be binding on the other cases, which would permit us to try this case fully and entirely at one time. As I say, I see no reason why there should not be such an agreement, Your Honor" (6a).

Judge Kraft concluded the conference by suggesting to counsel that they attempt to reach an agreement along the lines described by petitioners' counsel and that, if they could not so agree, they be prepared to show cause why the trial judge should not *sua sponte* consolidate all seven cases for trial (7a).

At the next pretrial conference, counsel reported to Judge Kraft, in the words of petitioners' counsel, Mr. Anderson, that they had "agreed in principle" (8a). Mr. Anderson indicated that petitioners were willing to accept a provision, in a draft stipulation then under consideration, that if respondents prevailed in the **Lawlor** case that would end the litigation in the cases here involved (9a). The

only major differences between the parties, as reported to the trial judge by their counsel, involved a provision (8a-11a) relating to certain affirmative defenses—which differed among the various cases—and respondents' desire for a provision which would preclude informing the **Lawlor** jury of the existence of the stipulation (13a-14a).

In an effort to resolve these differences, Mr. Anderson expressed his willingness to agree to what he called a "simplified stipulation" (9a) to waive a jury trial in the cases other than **Lawlor** and to provide for the district court "to apply [in the other six cases] the results of this jury trial [in **Lawlor**] insofar as they are applicable" (9a). He also indicated his willingness to try **all**[7] of the cases on the issue of liability, so long as the **Lawlor** case were tried "completely"—*i.e.*, on the issue of damages as well as liability—but added that he did not think such a consolidation necessary (12a-13a).

Finally, at the next pretrial conference, an agreement evolved. Petitioners' counsel informed Judge Kraft that he had "startling good news": the parties had agreed that "the one way to solve all those difficulties" was to waive jury trial in all of the cases, including **Lawlor** (17a). He stated that while he had express authority to waive a jury trial in the **Lawlor** case, he did not have such authority in the other six cases. As to those, he said he thought he had implied authority, that he had "no doubt that the clients [petitioners here] will be in accord with that" and that, "I am sure that as a practical matter my authority extends to the seven [cases]" (17a). At no time was any reference made or question raised concerning counsel's authority to enter into the agreement for all parties to be bound by the factual findings on the focal issues.

An off-the-record discussion followed that announcement, and then all defense counsel stated for the record

7. Wherever boldface type is used in this brief, the emphasis is ours.

their affirmation of the statement of petitioners' counsel that the parties waived jury trial in all seven cases (17a-18a). When one of defense counsel then asked whether he was correct in his understanding that "the Lawlor case will still be tried by itself but the stipulation [waiving jury trial] goes for all", petitioners' counsel answered in the affirmative (18a).

Another of defense counsel then stated that it was his understanding that **Lawlor** would be "tried in its entirety" and that adjudication of the issue of Sherman Act violation in **Lawlor** "shall be applicable to the other cases of the six plaintiffs that are pending" but that he was not clear on the subject of damages in those cases (18a). Following another off-the-record discussion, Judge Kraft stated on the record (18a-19a) the stipulation set forth at pages 5 to 7 of the petition for certiorari.

The stipulation provided that (1) jury trials were waived in all cases, (2) **Lawlor** would be tried to final determination in its entirety and trial of the other six cases would be postponed pending final adjudication in **Lawlor**, and (3) if it were finally determined in **Lawlor** that no conspiracy or monopolization existed, such finding would be determinative in the other six cases but if the determination in **Lawlor** were to the contrary the other six cases would then be consolidated for a trial at which petitioners would offer their evidence of the fact and extent of their injury by reason of the conspiracy or monopolization, and respondents would offer their evidence in support of affirmative defenses and in contradiction of the evidence of petitioners.

All counsel stated their concurrence in the stipulation (19a-20a). Petitioners' counsel, Mr. Anderson, showed that he correctly understood the effect of the stipulation when he said, during the **Lawlor** trial (28a):

> "I submit, if your Honor pleases, therefore, that this trial will be determinative of the Dave Mitchel case."

As noted above, **Lawlor** was tried in November-December 1957 and January 1958 (1b-2b) and resulted in a judgment based upon conclusions of law that there was no monopolization, no attempt to monopolize and no conspiracy within the meaning of Sections 1 and 2 of the Sherman Act.[8] The court of appeals (Goodrich, Kalodner and Staley, *JJ.*) unanimously affirmed in an opinion which specifically discussed and approved the trial court's holdings on the monopolization and conspiracy issues. 270 F. 2d 146 (3d Cir. 1959). This Court denied certiorari. 362 U. S. 922 (1960).

Following the denial of certiorari in **Lawlor**, respondents—relying upon the stipulation described above—moved for the summary judgments in the seven other cases. The motions were granted by the district court and the judgments were affirmed by the court of appeals. It is this action which petitioners now ask this Court to review.

In the district court, petitioners argued against enforcement of the stipulation on the ground that they had not had their "day in court" because of the district court's ruling, during the **Lawlor** trial, that the **Mitchel** case was not then being tried and that admissions concerning some defendants having subscribed to trade journals, obtained by the plaintiff from some of the defendants in that case, were therefore inadmissible (3b);[9] because "dozens of the

8. The exhaustive findings of fact and conclusions of law by Judge Kraft in the **Lawlor** case were not reproduced in the appendices below. They were, however, part of the record before the court below and, at respondents' request have been certified to this Court so as to be properly before the Court in its consideration of the present petition. The conclusions of law referred to in the text are numbers 3 and 4, Transcript of Oct. 22, 1958, p. 73, in the **Lawlor** case.

9. Neither in the court of appeals nor in their petition for certiorari to this Court in **Lawlor** did the plaintiffs in that case challenge—or even refer to—the district court's ruling excluding the **Mitchel** case Rule 36 admissions, discussed at pages 8-14 of the present petition for certiorari. Brief for Appellants, **Lawlor v. National Screen Service Corp.**, 270 F. 2d 146 (3d Cir. 1959); Petition for Certiorari, **Lawlor v. National Screen Service Corp.**, 362 U. S. 922 (1960) (No. 558 Misc., Oct. T. 1959).

court's findings of fact peculiar to the plaintiffs" in **Lawlor** had formed "in large part" the basis for the judgment for the respondents in the **Lawlor** case (4b); and because "much of the most important evidence introduced by plaintiffs in the Lawlor case was totally disregarded by the court" (4b).[10]

During oral argument on the motions for summary judgment in the district court, Judge Kraft, in an effort to ascertain precisely what position petitioners were taking, first asked their counsel, Mr. Anderson, whether he denied that the stipulation had in fact been made in the language appearing in the record (6b). After equivocating by asserting that he had not made a stipulation having the meaning and effect attributed to it by respondents (6b-7b), Mr. Anderson conceded that the stipulation had in fact been made and that the record accurately reflected its terms (7b).

Next, even though no question of his authority to make the stipulation had been suggested by Mr. Anderson's brief (3b-5b) or in his oral argument, Judge Kraft asked whether it was petitioners' position that Mr. Anderson's entry into the stipulation had been without authority (7b). Again equivocating, Mr. Anderson first asserted that he "had no express authority to agree to anything" (7b), then agreed that the stipulation was made with authority (7b-8b), and then stated that he "repudiate[d] any agreement that I may have made to have their [petitioners'] cases dismissed without their day in court" (8b). Pressing for a precise statement by Mr. Anderson of his position, Judge Kraft finally asked whether a full statement thereof was contained in petitioners' brief, and Mr. Anderson answered in the affirmative (9b), declining the court's express offer, twice repeated, to consider any supplementary position Mr.

10. The statements just referred to appear in petitioners' brief in the district court. The parties' briefs were incorporated in the record by that court's order of September 22, 1960 (1a).

Anderson might care to state orally (9b-10b). The brief (3b-5b) contained no hint whatever of any asserted lack of authority.

Judge Kraft, in his opinion (31a-35a) granting respondents' motions for summary judgments, rejected petitioners' contentions that they had not "had their day in court" because of the exclusion, during the **Lawlor** trial, of certain admissions obtained from the motion picture company defendants pursuant to Rule 36 in the **Mitchel** case. The contention was rejected on the ground, stated by Judge Kraft during the **Lawlor** trial, that "the stipulation did not embrace any agreement that evidence which was admissible in one case not on trial should be admissible in the case now on trial though otherwise inadmissible there" (34a).

Judge Kraft properly rejected petitioners' contention that the stipulation was not binding because the **Lawlor** judgment was based, "in large part", on findings peculiar to the plaintiffs in that case. There is not only no support in the record for that contention, but also it is noteworthy that the averments in all seven of the complaints were identical.

The Court of Appeals for the Third Circuit (Goodrich, Kalodner and Staley, *JJ.*) affirmed per curiam. That court (Petition, pp. 27-28), rejected the contention of petitioners' counsel that he had no authority to enter into the stipulation because a lawyer has no authority to compromise a case. The court pointed out that the stipulation was "no compromise of a lawsuit. It was, instead, a common sense way of handling several cases involving the same points", an "arrangement to expedite this litigation to final conclusion" and "well within the authority of the lawyers who participated" (*id.* at 28).

It is this determination of the court below which the petition for certiorari asks this Court to review.

Argument.

I.

THE PETITION FAILS TO ADVANCE ANY GROUND JUSTIFYING A GRANT OF CERTIORARI.

Viewing this record in a light most favorable to petitioners, the most that is presented is an issue as to the application of the pretrial stipulation of counsel for all parties, entered into in order to avoid six additional trials of the ultimate issues of conspiracy and monopolization based upon precisely the same evidence—hardly an issue meriting consideration by this Court. This is especially so in view of the fact that both the district judge, who was intimately familiar with the making of the stipulation and actually dictated its language (18a-19a), and the court of appeals have held that the stipulation meant exactly what it said and exactly what all parties and the district judge originally intended it to mean—namely, that the determination of the issues of Sherman Act violation at the trial of the **Lawlor** case would govern the identical issues in petitioners' cases. Therefore, since those issues were determined favorably to these respondents in **Lawlor**, there is no factual or legal basis to support a recovery by petitioners in the present cases.

Even if it could be assumed that there is doubt of the correctness of the interpretation of the stipulation by the courts below—and there is not, as we will show under Point II of our argument, *infra*, pp. 14-16, such a question of interpretation obviously does not present any issue of general importance worthy of this Court's consideration in the exercise of its certiorari jurisdiction.

The petition for certiorari should be denied since the issue involved herein is concerned solely with the enforcement of a procedural stipulation intended to prevent needless multiple trials of identical factual issues in companion

cases. It does **not** involve "principles, the settlement of which is important to the public", nor is it a case "where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal": **Layne & Bowler Corporation v. Western Well Works, Inc.**, 261 U. S. 387, 393 (1923); **Fields v. United States**, 205 U. S. 292, 297 (1907).

Without an assumption of doubt as to the correctness of the application of the stipulation by the courts below, no issue at all is presented by this record.

A.

The holdings of this Court in **Holker v. Parker**, 7 Cranch 435 (U. S. 1813), and **United States v. Beebe**, 180 U. S. 343 (1901), could become relevant, if at all, only under petitioners' absurd interpretation of the stipulation (Petition, pp. 19-20) as an agreement under which they stood to gain nothing even if the plaintiffs had prevailed in **Lawlor**.[11]

The fact is clear, however, as the courts below have held, that if the plaintiffs had prevailed in **Lawlor**, the stipulation would have gained for petitioners a determination, conclusive against respondents, that respondents had violated the Sherman Act. That being the stipulation's plain meaning, there is no basis for petitioners attempt to characterize it as a compromise of a lawsuit within the holdings of the **Holker** and **Beebe** cases that a lawyer must have express authority for a compromise.[12] The stipulation

11. Significantly, petitioners did not advance this interpretation of the stipulation either in their brief (3b-5b) or oral argument (6b-10b) before the district judge.

12. The present suggestion by petitioners' counsel that he lacked authority is an unsupportable afterthought. Contrary to the impression sought to be created by the petition (pp. 7-8), the only qualification expressed by counsel as to his authority during any of the pretrial conferences was in connection with the waiver of jury trial in the cases other than **Lawlor** (17a). And, as our Statement (p. 8 *supra*) indicates, petitioner clearly abandoned any question of lack of authority during the argument in the district court on the present issues.

was designed, as the court of appeals said, as "a common sense way of handling several cases involving the same points" (Petition, p. 28).

The court of appeals further held that such an agreement was "well within the authority of the lawyers who participated" (*ibid.*). This conclusion is indisputably correct and is actually supported by this Court's holding in the **Holker** case. In that case the attorney, without his client's express consent, first agreed to refer a claim to arbitration and then agreed to the challenged compromise which was embodied in the arbitrators' award. Mr. Chief Justice Marshall's opinion held that while the attorney lacked authority to agree to the compromise he did have authority, even without his client's express consent, to agree that the case could be referred to arbitration (7 Cranch at 448). If an attorney's implied authority extends to reference of a claim to arbitration, it extends *a fortiori* to an agreement, such as the stipulation here, that issues involved in the claim will be determined by the trial of identical issues in a related case.

B.

In footnote 3 at page 19 of their petition, petitioners suggest that, even though the stipulation is "bilateral", as the courts below have held, it is not enforceable because "the one and only lawful way for the trial court to have dealt with the situation before it was to order the cases consolidated for trial, and **that is obviously what petitioners' counsel believed had been ordered.**"

This statement, in the face of the record facts, is palpably disingenuous, and the issue which petitioners seek to draw from it is frivolous. As our Statement shows (pp. 3-6, *supra*), the references to consolidation, in the pretrial conference discussions preceding the making of the stipulation, were by the trial judge who suggested that he would consolidate *sua sponte* if the parties themselves were unable to arrive at a satisfactory stipulation. Petitioners' counsel

flatly opposed consolidation (4a, 5a).[13] That Mr. Anderson fully understood that the stipulation did not provide for consolidation is obvious not only from the express provisions of the stipulation—as to which petitioners' counsel said, "I subscribe to that" (19a)—but also from his affirmation of record, which leaves no doubt that he understood exactly the effect of his deliberate agreement (18a):

> "MR. NIZER: As I understand it, when we say 'the cases,' the Lawlor case will still be tried by itself but the stipulation goes for all, isn't [that] the way it began?
>
> MR. ANDERSON: Yes."

C.

Equally frivolous and equally indicative of the lack of importance of the matters which the petition for certiorari seeks to present is the subtle but transparent effort of the petition to suggest that petitioners' counsel, Mr. Anderson, who has been counsel for petitioners at all times during this litigation, and who signed the petition for certiorari, made "an agreement improvidently or deceitfully" (p. 21), that his judgment was "imposed upon, or not fairly exercised" (p. 22), and that he was a victim of "surprise" (p. 12).

The implication that Mr. Anderson was imposed upon, or that he was improvident or deceitful, is so conclusively negated by the record of the discussions in the presence of the trial judge preceding the making of the stipulation that

---

13. Later, he indicated a willingness to consolidate, trying all cases on the issue of liability so long as the jury trial also included the issue of damages in **Lawlor** (12a), but he unequivocally asserted that he did not think such a consolidation necessary (13a). That procedure, to which petitioners' counsel was willing to agree, was not what the trial judge had in mind. Judge Kraft proposed to try a consolidated case on the issue of liability, severed from the issue of damages (5a, 6a, 7a, 15a).

further comment is unnecessary.[14] And as for the suggestion of "surprise", which relates to the exclusion from the **Lawlor** case of the admissions of fact in the **Mitchel** case, the trial judge has clearly demonstrated the lack of merit in petitioners' position.[15]

Petitioners' counsel, in an effort to obtain an opportunity to retry the issues of Sherman Act violation which have already been fully tried and adjudicated in the **Lawlor** case, is disavowing the stipulation into which he deliberately entered, and, in violation of its terms, is seeking to create the very situation which the stipulation was designed to prevent. He is attempting to thwart what the court below (Petition, p. 28) properly characterized as an arrangement "to expedite this litigation to final conclusion".

II.

THE COURTS BELOW CORRECTLY INTERPRETED AND APPLIED THE STIPULATION.

The stipulation provided, in effect, that the determination as to Sherman Act violation in the **Lawlor** case would be binding on all parties, and the courts below have so interpreted and applied the stipulation. Taking issue with that

---

14. All of the relevant portions of the pretrial conference transcripts appear at 2a-19a. The history is summarized in some detail in our Counter-Statement, pp. 3-6 *supra*.

15. In commenting on this situation when it arose during the **Lawlor** trial, Judge Kraft said (25a): "These Requests for Admissions were filed in the other case. It would have been only a little difficult to have filed like copies in this case, and you would have had them if they were [deemed] of importance to your case."

Again (28a): "* * * That they were not filed is counsel's problem, not the Court's. What were the reasons that it was not done is counsel's problem, not the Court's. No meritorious explanation has been advanced for the omission."

Previously, petitioners' counsel had said (26a): "Well, Your Honor, all I can do is state my position. I don't assume that I can justify my position."

interpretation, the petition (p. 19) challenges the statement of the court of appeals that "Defendants took their chances on judgments against them in seven cases if the *Lawlor* case was won", and seeks to justify that challenge by asserting that if plaintiffs had won in **Lawlor**, "the other cases would go to trial in regular course".

This is not so.

First, even before Judge Kraft had dictated the stipulation, respondents knew that if they lost in **Lawlor**, the proposed stipulation would foreclose them from retrying the Sherman Act issues in petitioners' cases. As stated by one of respondents' counsel (18a)—

> "MR. WARD: It is my understanding * * * that the issue in the Lawlor case as respects the question whether there has been a violation by the defendants, or any of them, of the Sherman Act shall be applicable to the other cases of the six plaintiffs that are pending."

Second, it was natural for Judge Kraft in dictating the stipulation to have used one form of language in dealing with the possibility that plaintiffs would lose on the Sherman Act issue in **Lawlor**, in which event the litigation in the other cases would end without any occasion for further proceedings, whereas in dealing with the possibility that plaintiffs would win in **Lawlor**, he used a different form of language to spell out the further proceedings which would be necessary in petitioners' cases on the issues of damages and affirmative defenses. It is apparent from the stipulation's express provisions that Judge Kraft did not approve a "one-sided" stipulation whereby petitioners would have had to reestablish a Sherman Act violation in their cases if the plaintiffs had won in **Lawlor**. On the contrary, the stipulation was designed to relieve petitioners from such a burden if the plaintiffs in **Lawlor** prevailed. Thus, in describing the further proceedings in petitioners' cases if the plaintiffs won in **Lawlor**, Judge Kraft made it clear that

there would be no issue left to try with respect to the existence of a conspiracy or monopolization. Judge Kraft concluded the stipulation by saying (19a):

> "In these trials [the consolidated trials of petitioners' cases in the event the plaintiffs prevailed in Lawlor] the plaintiffs shall offer their evidence in support of their allegation that they suffered injury or damage by reason of the unlawful conspiracy or damage by reason of the unlawful conspiracy or monopoly and evidence of the extent of the damage alleged to have been suffered."

The stipulation expressly provided that if the plaintiffs established a Sherman Act violation in **Lawlor** there would be left for trial in petitioners' cases only the remaining issues peculiar to petitioners. Respondents could not have—and would not have—contended to the contrary had they lost in **Lawlor**. And if they had contended so, petitioners' counsel quite justifiably would have cried "foul".

Thirdly, that petitioners' counsel well understood the meaning and effect of the stipulation to be exactly as we have stated is unequivocally demonstrated by his statement, made prior to the dictation by the court of the stipulation on the record, when he said (6a):

> "MR. ANDERSON: I see no reason why there should not be an agreement that the result of this case [Lawlor] shall be binding on the other cases, which would permit us to try this case fully and entirely at one time. As I say, I see no reason why there should not be such an agreement, Your Honor."

Then, again, during the **Lawlor** trial, he said, after reading part of the text of the stipulation (28a):

> "I submit, if Your Honor pleases, therefore, that this trial will be determinative of the Dave Mitchel case * * *."

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LOUIS NIZER,
WALTER S. BECK,
Attorneys for National Screen Service Corporation.

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON,
Of Counsel.

LOUIS J. GOFFMAN,
Attorney for Warner Bros. Pictures Distributing Corporation.

WOLF, BLOCK, SCHORR
& SOLIS-COHEN,
Of Counsel.

W. BRADLEY WARD,
EDWARD W. MULLINIX,
Attorneys for Columbia Pictures Corporation, Metro-Goldwyn-Mayer Inc., (formerly Loew's Incorporated), Paramount Film Distributing Corporation, RKO General, Inc. (formerly RKO Radio Pictures, Inc.), TCF Film Corporation (formerly Twentieth Century-Fox Film Corporation), United Artists Corporation and Universal Film Exchanges, Inc.

SCHNADER, HARRISON,
SEGAL & LEWIS,
Of Counsel.

August 31, 1961

LIBRARY

Office Supreme Court, U.S.
FILED
SEP 20 1961
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

No. 269
October Term, 1961

MORRIS W. LIPP, trading as Midwest Poster Exchange,
Petitioner

BENJAMIN SIEGEL, trading as Theatre Advertising Company,
Petitioner

FANNIE SCHRADER, Administratrix of the Estate of Jay Schrader, trading as Charlotte Poster Exchange, Deceased,
Petitioner

DAVID MITCHEL, trading as Southwest Poster Service,
Petitioner

JACOB RIFF,
Petitioner

HARRY VOGELSTEIN, trading as Baltimore Poster Company,
Petitioner

v.

NATIONAL SCREEN SERVICE CORPORATION ET AL.,
Respondent

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as Independent Poster Exchange et al.,
Petitioners

v.

NATIONAL SCREEN SERVICE CORPORATION ET AL.,
Respondent

PETITIONERS' REPLY BRIEF

FRANCIS T. ANDERSON,
Attorney for Petitioners.

Girard Trust Company Bldg.,
Philadelphia 2, Penna.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

TABLE OF CONTENTS

	Page
Petitioners' Reply Brief:	
Argument	1
Conclusion	3

PETITIONERS' REPLY BRIEF

The Brief For Respondents In Opposition contains three material misstatements of fact:

(1)

Respondents' statement (page 8, line 24) that petitioners' counsel ". . . agreed that the stipulation was made with authority (7b 8b)" is unfounded and untrue, and this untrue statement, unsupported, as it is, by any quotation from the record, is repeated in exaggerated form at page 11, note 12, as follows:

> ". . . as our Statement (p. 8, *supra*) indicates, petitioners' counsel clearly abandoned any question of lack of authority during the argument in the district court on the present issues."

What petitioners' counsel stated in the District Court in this connection is fully quoted at pages 7-8 and 14-15 of the petition filed in this Court, and reference thereto will show that both before and after the stipulation was adopted petitioners' counsel repeatedly and consistently asserted that he had not been authorized by any of the petitioners to enter into any stipulation.

It is true, as respondents assert (page 11, note 12) that prior to the time of the adoption of the stipulation counsels' declaration of lack of authority related only to the proposal of waiver of a jury trial, but it seems self

evident that if counsel lacked authority to agree to waiver of a jury trial it could not reasonably be assumed that he had been given authority to agree that his clients' cases might be dismissed without opportunity for a hearing before either the court or jury.

Furthermore, it might be noted that neither of the opinions rendered by the courts below proceeds on the theory that petitioners' counsel had not given notice of lack of any express authority to enter into the stipulation.

(2)

At page 14, lines 7-9, respondents state, in effect, that petitioners' cases "have already been fully tried and adjudicated in the Lawlor case"; and similarly, at page 10, line 6, respondents state that petitioners' cases and the Lawlor case are "based upon precisely the same evidence."

These are incorrect statements of fundamental importance.

For instance, it cannot truthfully be said that petitioner Mitchel's case was "fully tried" in the Lawlor case because the undisputed fact is that in the trial of the Lawlor case the court rejected, as incompetent, certain relevant and material evidence of conspiracy which would have been unquestionably competent if Mitchel's case had been on trial (petition pages 8-14). This rejected evidence has never been heard by any court, and therefore it is certain that Mitchel's case has not been "fully tried"; and by the same token, none of the cases of the other petitioners has been fully tried because there has been no consolidation for trial of any case with any other case, and therefore the amount of possible evidence yet to be heard is unlimited.

(3)

At page 16, lines 11-14, respondents state that:

> "The stipulation *expressly* provided that if the plaintiffs established a Sherman Act violation in Lawlor there would be left for trial in petitioners' cases only the remaining issues peculiar to petitioners." (Emphasis added.)

There is certainly no such *express* provision in the stipulation, and it is far from clear that any such provision can reasonably be implied; but all of this is really immaterial in view of the fact that, even if thus construed, the stipulation would still be invalid because of the omission of any grant of right to any petitioner to introduce on his own behalf any evidence in the trial of the Lawlor case.

CONCLUSION

Wherefore it is submitted that petitioners' prayer for issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

FRANCIS T. ANDERSON,

Attorney for Petitioners.